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21 *Attorney for Plaintiff Eric Davis And the Putative Class*

22 **UNITED STATES DISTRICT COURT**  
23 **SOUTHERN DISTRICT OF CALIFORNIA**

24 ERIC DAVIS, on behalf of himself  
25 and all others similarly situated,

26 Plaintiff,

27 vs.

28 AT&T SERVICES, INC.,

Defendant.

CASE NO. 15-cv-02342-DMS-DHB

**DECLARATION OF KIRA M. RUBEL  
IN SUPPORT OF PLAINTIFF'S  
MOTION TO AMEND THE  
SCHEDULING ORDER TO PERMIT  
THE FILING OF HIS FOURTH  
AMENDED COMPLAINT**

**Hearing Date:** October 14, 2016

**Hearing Time:** 1:30 p.m.

**Hearing Location:** Courtroom 13A  
333 West Broadway  
San Diego, CA 92101

**Judge:** Hon. Dana M. Sabraw

1 I, Kira Rubel, declare:

- 2 1. My name is Kira Rubel and I am counsel for Plaintiff Eric Davis and the  
3 putative class in the above captioned action. I make the following statements  
4 based upon my own personal knowledge and, if called to testify regarding the  
5 facts contained herein, can and would do so competently.
- 6 2. During the Rule 26f conference, I mentioned to the Court and counsel that I  
7 was concerned that an early amended pleading deadline could prejudice  
8 Plaintiff's case since there were numerous factual issues to sort through. As I  
9 recall, The Honorable Magistrate Judge Bartick responded that the Court  
10 would be rational in considering any motion by Plaintiff for leave to amend if  
11 the facts required it, or words of similar effect.
- 12 3. My co-counsel and I have been diligent in our continuous efforts to engage in  
13 discovery with Defendant. In fact, I sent out Plaintiff's Requests for  
14 Production, Set One, on December 31, 2015. I received Defendant's initial  
15 responses on March 18, 2016, due to various extensions. A true and correct  
16 copy of Defendant's responses to Set One is attached hereto at Exhibit D.
- 17 4. The bulk of the documents responsive to Set One were regarding calls to  
18 Plaintiff and the customer's account in which his number was transposed. In  
19 spite of receiving these records on March 18, we were not sure exactly how  
20 to read these documents, since they were incredibly hard to interpret with  
21 their various acronyms. Even though we could see in Plaintiff's records that  
22 he had indicated that Defendant was calling the "wrong number," we had no  
23 idea in what context this was said, what types of calls these were, etc.
- 24 5. We walked through the call records to Plaintiff with defense counsel, Hans  
25 Germann, by telephone and even he indicated that it would be best if one of  
26 Defendant's employees could go over the documents with us and interpret  
27 the short hand and different types of calls made to Plaintiff.
- 28 6. Taking Mr. Germann's cue, I sent Mr. Germann an email on March 28, 2016  
about the topics upon which I wished to depose one or more of Defendant's

1 agents. Included in this topic list was a request to understand more about  
2 calls to “wrong numbers”.

- 3 7. Ultimately, the earliest Defendant could make anyone available was May and  
4 we settled on May 25 as the date to depose two individuals. Unfortunately,  
5 defense counsel was unable to make deponents available for all of my  
6 requested topics in the Rule 30(b)(6) notice, which is why we conducted  
7 subsequent depositions on June 28/29 on the remaining topics.
- 8 8. On April 1, 2016, I sent Plaintiff’s Special Interrogatories and Requests for  
9 Admission, Sets one, and Requests for Production, Set Two. This second set  
10 of document requests inquired, generally, into Defendant’s terms and  
11 conditions, scripts for outgoing calls, and recordings of calls with Plaintiff.  
12 A true and correct copy of Defendant’s responses to Set Two is attached  
13 hereto at Exhibit E.
- 14 9. I received the documents responsive to our Request for Production Set Two  
15 on May 18, 2016. This batch of documents contained the first reference to  
16 calls to “wrong numbers” in Defendant’s records that Plaintiff had seen –  
17 although it was in reference to the debt collection department exclusively.
- 18 10. The Rule 30(b)(6) depositions which took place on May 25, 2016 were of  
19 Joni Hixson and Michael Pederson. Mr. Pederson testified exclusively  
20 regarding the type of dialer used by Defendant and is not relevant to this  
21 motion. Ms. Hixson is the lead compliance person for ATT’s collection’s  
22 department and she testified regarding what happens when the debt collection  
23 department reaches a wrong number. In that instance, the collection agent is  
24 required to send a form email to a specific internal email address with the  
25 incorrect phone number included in the body of the email. This phone  
26 number is then circulated to all departments to be excluded from all other  
27 outgoing call lists, a process which takes approximately 30 days. This was  
28 the first time we realized that perhaps Defendant had a policy with respect to  
“wrong number” calls.

- 1 11. Following Ms. Hixson's deposition, I asked opposing counsel whether  
2 Plaintiff's phone number was ever included in one of these "wrong number  
3 emails" from the collection's department – defense counsel stated that it was  
4 not. Although we contend that these wrong numbers should be included in  
5 the class ultimately, since Plaintiff was not included in the emails, there was  
6 no basis to update the class definition at that time.
- 7 12. Based on Ms. Hixson's testimony, I composed Requests for Production Set  
8 Three, and asked for all outgoing call logs which indicated that Defendant  
9 had reached a wrong number. These requests were sent on June 3, 2016. A  
10 true and correct copy of Defendant's responses to Set Three is attached  
11 hereto at Exhibit F. These requests, numbers 29-32, ultimately were the  
12 source of the Parties' recent Joint Motion for Determination of Discovery  
13 Dispute.
- 14 13. During this early June time frame, we were in the process of arranging a time  
15 for further Rule 30(b)(6) depositions on the topics I had noticed in the first  
16 Rule 30(b)(6) notice. The earliest dates that Defendant could arrange with the  
17 appropriate people were on June 28 and 29, 2016 at AT&T's Atlanta,  
18 Georgia facility.
- 19 14. At the June depositions and, specifically, during the deposition of Grace  
20 Carter, we learned about Defendant's Proactive Churn Management Program  
21 ["PCM"], which is the department that calls customers in an effort to  
22 preemptively resolve account issues prior to service cancellation.
- 23 15. Ms. Carter testified that defendant kept records of PCM calls to "wrong  
24 numbers" in both their internal account notes and their vendors' databases of  
25 outgoing calls placed on Defendant's behalf, not just in the "wrong number  
26 emails" that Ms. Hixson had testified about. Ms. Carter also testified that it  
27 was the practice of this department to continue to call individuals who stated  
28 Defendant had reached a wrong number.

1 16. The account notes associated with calls to Plaintiff's cell phone show calls  
2 made by "proactive churn management". Although we didn't know  
3 specifically what this meant before the deposition of Ms. Carter, the  
4 combination of testimony by Ms. Carter and the Plaintiff's account notes  
5 show that Mr. Davis was one of the individuals who informed Defendant that  
6 they had reached the wrong number and who continued to receive subsequent  
7 calls regardless.

8 17. Thus, we believe that the PCM Department can identify calls to wrong  
9 numbers, such as those to Plaintiff, but we did not know this until the  
10 deposition of Ms. Carter revealed Defendant's unwritten policy to continue  
11 calling wrong numbers. This information could not have been obtained prior  
12 to Ms. Carter's deposition since she was only made available to Plaintiff in  
13 June and is the only deponent who possessed knowledge of Defendant's  
14 practices regarding wrong number calls within the PCM Department.

15 18. This will be our Fourth Amended Complaint. The first amendment was at  
16 Defendant's request to update the name of Defendant in the pleading. The  
17 motion for leave to file the second amendment was filed on April 15, 2016,  
18 the last day Plaintiff was permitted to file his motion for leave to amend per  
19 the Court's scheduling order, in order to add telemarketing allegations  
20 against Defendant. Finally, the Third Amended Complaint was filed on June  
21 9, 2016, at Defendant's request and stipulation, to add that Plaintiff had  
22 received two calls in a 12-month period, in order to avoid a motion to  
23 dismiss.

24 19. We did not have sufficient information on April 15, 2016 to amend the  
25 complaint to add this updated class definition or the supporting facts. Until  
26 the June deposition of Ms. Carter, we had little to no understanding of the  
27 PCM Program and certainly had no knowledge regarding that department's  
28 treatment of "wrong number" calls.

1 20. On September 1, 2016, I sent defense counsel, Mr. Germann, the proposed  
2 amended complaint for his review and stated our intent to move for leave to  
3 amend. On September 2, 2016, he indicated his client's intent to oppose our  
4 request. Mr. Germann and I also met and conferred telephonically on  
5 September 8, 2016 to fully discuss Plaintiff's motion and he reiterated his  
6 intent to oppose this motion.

7  
8 I declare the foregoing is true under penalty of perjury and the laws of the  
9 United States of America on this 16th day of September, 2016.

10 **LAW OFFICES OF KIRA M. RUBEL**

11 /s/ Kira M. Rubel

12 KIRA M. RUBEL

13 COUNSEL FOR LEAD PLAINTIFF, ERIC DAVIS.